IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ~~800~~ 5

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P. KELLY, STUART SOLOMON BROWN,
Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Opinion below:

The opinion of the Circuit Court of Appeals (majority Tr. 180; dissenting Tr. 221; on petition for rehearing Tr. 231) is reported in 123 F. 2d at page 111.

The trial court filed no opinion.

Jurisdiction:

The judgments of the Circuit Court of Appeals were entered September 15, 1941. (Tr. 222) A petition for rehearing was denied on November 6, 1941. (Tr. 231) The jurisdiction of this court is invoked under Section

As there is duplication of page numbers in the printed record, we shall refer to the volume entitled Transcript of Record as Tr. to the volumes entitled Bill of Exceptions as R. and to the volume entitled IV Transcript of Record as R. IV.

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Rules of Practice and Procedure in Criminal Cases promulgated by this court.

Questions Presented.[1]

1. Whether the evidence sustained the gambling house ownership theory of the prosecution.

2. Whether the evidence proved any connection of respondents with Johnson's income tax returns.

3. Whether the order of February 28, 1940, was valid.[2]

4. Whether counts of the indictment were invalid in charging aiding and abetting as a continuing offense, of the principal crime, charged as a non-continuing offense.

5. Whether counts of the indictment were invalid in charging that respondents were accessories both before and after the fact.

6. Whether the testimony of witness Clifford invaded the province of the jury.

Statement of the Case.

We feel a moderate amplification of the Statement presented by the petition herein, will be of assistance to the Court.

On March 29, 1940, during the March term of court, an indictment was returned by the December 1939 grand jury

1. We agree with the contention of counsel for Johnson, case No. 726, that there is but one question presented, viz., construction of the order of February 28, 1940. However, we have briefly discussed the several questions suggested by the petition for certiorari; this for the information of the Court and to demonstrate that there is no question presented which is entitled to consideration by the Court.

2. The petition admits that the order was "inartistically drawn" (petition p. 13). The petition on which the order was based was similarly defective (Tr. 29). The lower court held the order to be void (Tr. 180).

3. John M. Flanagan, an appellant in the Circuit Court of Appeals, died in August, 1941, while his case was pending and before decision therein. A verified motion, suggesting the death and asking for an order releasing sureties on the bail bond was filed in the Circuit Court of Appeals. The motion was opposed by the government and was overruled by the court without prejudice.

(Tr. 2-25). The first four counts charged Johnson (respondent in Case No. 799) with wilful attempts to evade income taxes for the years 1936 to 1939 inclusive by filing false income tax returns on March 15th of each following year; these counts also charged that these respondents, Sommers *et al.*; did from the beginning of the calendar year involved in each count up to the time of the return of the indictment, aid, abet, conceal, induce and procure Johnson to so attempt to evade said taxes. The fifth count charged a conspiracy throughout the same period of years to defraud the United States of the taxes upon Johnson's income for the years in question.

Johnson was a person of very substantial means. He owned, either alone or jointly with others than these respondents, several pieces of real estate in and about Chicago, some of which were rented to some of these respondents and used by them as gambling establishments and some of which were rented to third persons for business purposes.

These respondents (except Brown who operated a currency exchange) operated gambling houses on premises rented in some instances from Johnson, as stated, and in other instances from third parties.

Johnson reported very large income and paid large taxes thereon for the years in question. These respondents also reported substantial income and paid taxes thereon.

At the trial the government introduced evidence against Johnson on two distinct theories:

(1) By offering proof tending to show that he expended in the years involved more money than he had available for spending, according to the income reported.

This expenditure evidence in no way implicated these respondents.

(2) By undertaking to prove that he was the *sole* owner

of the gambling houses operated by these respondents, as the basis for a presumption that *all* the checks cashed, money deposited and currency exchanged by the operators of these houses was income, not to them, but which they delivered to Johnson; which said aggregate of assumed income was larger than the amounts reported by Johnson in his returns.

The proof under the second or gambling house ownership theory was entirely circumstantial. The Circuit Court of Appeals held, after careful examination of this evidence and giving it the view most favorable to the government, that at most it indicated that Johnson had *some* interest in the gambling houses, but that the extent of such interest was not disclosed by the evidence. The Court of Appeals said (Tr. 195):

> "The evidence does not show that he (Johnson) was the sole owner and therefore entitled to all the proceeds. * * * As already stated, Johnson reported a large income for each of the years in question, and to say that his interest in the gambling houses was such as to entitle him to an income greater than that reported is to indulge in rank speculation. If Johnson had reported no income for those years, a different situation would have been presented."

Speaking of these respondents, the lower court said (Tr. 196):

> "These returns (of Sommers *et al.*) disclose a substantial income on the part of the co-defendants, who, according to the government's theory, were mere employees of Johnson in the operation of the various gambling houses. The amount of income reported indicates that such co-defendants had an interest in such houses rather than that they were mere employees of Johnson as contended."

Neither the petition for certiorari nor the dissenting opinion in the Court of Appeals directly takes issue with or attempts to controvert the soundness of the reasoning of the majority last above set forth.

A second reason for holding the evidence under the substantive counts insufficient against these respondents, consisted of the absence of any evidence that these respondents had any connection with the preparation or filing of Johnson's tax returns on March 15th, and the further absence of any evidence of knowledge or information on their part of the contents of Johnson's returns.

Aside from the lack of evidence on essential issues to make a case against these respondents, numerous errors in failure to observe the well-known rules of criminal procedure intervened both before and during trial.

The first in point of time of these errors occurred in the petition of the grand jury and the order based thereon of February 28th, 1940, (Tr. 29) for the purpose of continuing the existence of the grand jury into the third or March term of its existence. A plea in abatement of these respondents (Tr. 32) pointed out that the order violated the terms of the statute (U. S. C. Supp. V. Title 28, sec. 421; Judicial Code sec. 284), in that it purported to authorize the grand jury to continue not only those investigations begun in the December or original term, but also those begun in the February term. The plea also demonstrated that the fourth count was invalid as beyond the authority of the particular grand jury in that it charged an offense committed on March 15, 1940, which could not possibly have been the subject of investigation in the December, 1939, term, which expired more than a month before the offense was committed.

These respondents moved for a rule on the government to answer the plea in abatement (Tr. 44). This was denied and a motion of the prosecution to strike the plea was granted by the trial court (Tr. 46). The Court of Appeals held that the striking of the plea was erroneous and that the plea should have been sustained.

In the Court of Appeals the prosecution endeavored to

save the indictment (and escape the effect of the invalidity of the defective order) by reference to its averment that investigation of the matters charged therein had been begun in the December term of court. In the petitions for rehearing and for certiorari (Petition, pp. 7-8), the government mistakenly contended that these averments were supported by proof consisting of the introduction of part of the grand jury examination of respondent Brown, set forth in full in Government Exhibit O-211, claiming it showed investigation of indictment matters. Government Exhibit O-211 (R. 614), bears on its cover the caption: "In the Matter of William R. Skidmore."

Even more conclusive was the testimony of Government witness Ryan (R. 527), the court reporter who transcribed Brown's examination in the Exhibit O-211. On cross-examination (R. 528), Mr. Ryan testified:

> "I got the information to put 'In re William R. Skidmore' on there when the grand jury was impanelled on the first day. * * * I put the words 'In re William R. Skidmore' because the jury was impanelled to investigate matters relating to William R. Skidmore and that only."

This was the only evidence offered or received during the long seven weeks' trial tending to identify the subject matter of investigation by the grand jury in the December term.[1]

Proceeding next to the charges against these respondents in the indictment, the lower court held that inasmuch as the first four counts charged Johnson with criminal attempts to evade taxes committed on March 15 of each year, while charging these respondents with aiding and abetting such attempts throughout a long period of time both before and after March 15, viz., from January 1st of the tax year to the time of the return of the indictment, there was a fatal

1 Skidmore, originally a defendant in the indictment, was dismissed before trial by the government, without explanation (Tr. 14).

inconsistency between the charges against Johnson and those against these respondents, which inconsistency invalidated the latter.

The Court of Appeals held further (as before stated) that there was no evidence that these respondents had any connection with the preparation of Johnson's tax returns, or even had knowledge or information as to their contents, and that therefore the evidence was insufficient against these respondents under the first four counts.

Finally the Court of Appeals held that there was reversible error in allowing witness Clifford, an accountant employed by the government, to testify as to the amount of Johnson's income and his tax liability, which computation was based upon the exhibits and the other evidence in the case (R. 742-743). The court stated that the questions propounded to this witness did not contain any assumptions nor any hypotheses, and that consequently the jury were not permitted to pass upon the soundness or validity of the premises upon which the answers were based and that therefore the essential elements of proper hypothetical questions by which they are ordinarily saved from invading the province of the jury, were eliminated.

SUMMARY OF ARGUMENT.

1. *The Petition shows no sufficient reason for Certiorari.* No grounds for granting the writ of certiorari as suggested in the Rules of this Court are shown by the petition. The case is not one of new or unusual legal questions but of violation of well-known rules of criminal procedure. The trial was lengthy because of efforts to involve these respondents in the tax affairs of Johnson, with which they had no connection.

The contention that the lower court substituted its opinion for that of the jury as to credibility of witnesses and weight of evidence is without basis. On the contrary, the court merely found material absence of evidence.

2. *Insufficiency of evidence of ownership of gambling houses.* In view of the payment of large taxes by Johnson, it was incumbent upon the Government to prove that Johnson was sole owner of gambling houses involved in order to support presumption that he received all the income therefrom. No such proof was introduced. The lower court held the evidence, considered in the light most favorable to the Government, only indicated some (indefinite) interest of Johnson in the gambling houses. Therefore, there was no proof, direct or indirect, that the income which Johnson (presumably) received from the gambling houses exceeded the large amounts which he reported in his tax returns.

3. *Insufficiency of evidence of connection of respondents with Johnson's tax returns.* There was no proof of any connection of these respondents with Johnson's returns or any knowledge or information on their part of contents of returns. The gist of the charge against Johnson was filing false returns. The authorities hold that to constitute one an accessory he must have knowledge of the principal's crime, and must have an intent to aid the crime.

and that lack of evidence of a "stake" in the principal's affairs is significant. Facts creating liability under the civil law often are insufficient to cause liability under the criminal law, as here.

The claim that the lower court's decision leaves available for enforcement of Revenue Laws only Section 3793 is without basis. The evidence here failed to make a case under either Section 145(b) or Section 3793. The prosecution of other cases with sufficient evidence is not hampered by this decision. The decision here did not limit the application or scope of the statute but merely held that evidence was lacking.

4. *Insufficiency of the allegations of continuing the Grand Jury was not cured by the averments of the indictment and the latter were disproved by the evidence.* The statement in the indictment as to the authority for continuance of the grand jury is contradicted by the statements in the order of February 28th and the petition on which the order was based. There was error in the failure of the government to offer proof to support the indictment in view of this inconsistency, which error was increased by the error of the prosecution in causing defendants' motion to Quash to be stricken, thus preventing evidence by defendants on this issue.

The contention that the proof at the trial of Brown's grand jury examination sustained the averments of the indictment regarding grand jury continuance is without basis. Government Exhibit O-211 and witness Ryan's testimony prove that the original investigation was of Skidmore. The latter was dismissed from the indictment before trial. Prejudice always exists where a grand jury acts without authority.

The lower court's decision as to the fourth count does not impede the administration of the law. The decision merely recognizes a self-evident fact, viz., that the grand

jury in the December term could not possibly be investigating an offense committed on March 15th thereafter. The lower court did not hold that the precise issue and particular defendants must be determined in the original term of the grand jury. Had the court so decided, these respondents all would have been discharged as none of them were shown to have been under investigation in the original term.

The claim that this decision conflicts with the purpose of the amendments to the law is without basis. (Section 421.) These amendments extend the time of the grand jury's existence while limiting the objects of the investigation during such extended existence. The Court's decision merely enforces the language of the statute regarding objects of investigation and does not limit the time of existence.

5. *Invalidity of charges of aiding as a continuing crime of an attempt charged as a non-continuing crime.* The indictment charges a definite offense on March 15th by the principal but charges the accessories aided and abetted the commission of the offense both before and after such date, for a period of years. This is a fatally defective charge. The allegations of time should not be considered surplusage but even if so there would be fatal error by the joinder of parties charged in the same count, one with a non-continuing offense and the others with a continuing offense.

6. *Fatal duplicity in charging respondents as accessories before and after the fact.* There is a fundamental difference in law between accessory before and after the fact. One aids commission of the crime; the other conceals the crime or the criminal afterward. The punishment under the Federal statutes is substantially different. Accessories after the fact can receive only one-half the maximum punishment of accessories before the fact.

Joinder of both charges in one count is fatal. Allegations of time should not be considered surplusage.

7. *Error in introduction of Clifford's testimony was fatal.* The so-called hypothetical questions were improperly prepared. They contained no assumptions and no hypothesis. The jury could not know what assumptions were made by the witness in arriving at his computations. The witness expressed his opinion on the ultimate issues before the jury and in doing so weighed the evidence and the credibility of witnesses. This was entirely erroneous and highly prejudicial.

ARGUMENT.[1]

1. The Petition Shows No Sufficient Reason for Certiorari.

We submit that no sufficient reason is shown by the petition for granting certiorari—certainly none arising in the cases of the respondents. None of the grounds for the granting of the writ of certiorari which are suggested in paragraph 5 of Rule 38, of the Rules of the Supreme Court, is exhibited by the petition here. The errors of the prosecution which invalidate the convictions of respondents, while fundamentally violative of respondents' rights, were the errors of failing to follow well-known rules of criminal procedure. No novel or difficult question of statutory construction was involved; no difference of opinion between Circuit Courts of Appeals; no important or substantial decision was made at variance with the decisions of this court. In short, the case is a routine case of the commission of routine but fatal procedural errors combined with the absence of evidence of guilt making it the duty of the Court of Appeals to reverse the convictions of these respondents.

Study of this voluminous record, with its thousands of pages and many hundreds of exhibits, its mountainous mass of details of the tedious and distasteful trivia of the gambling business, indicates that the case has reached its present size and appearance of complexity, through the efforts of the trial prosecutors to involve these minor friends of Johnson in his tax affairs, with which the evidence indicates they had no connection.

In discussing the evidence, the petition inadvertently makes an incorrect statement in the footnote on pages 11-12 to the effect that the lower court substituted its judg-

1 We shall endeavor to follow the order of argument in the petition for certiorari

ment for that of the jury, as to the credibility of witnesses and the weight of the evidence. In not a single instance has the Court of Appeals invaded the province of the jury. In every instance in which the lower court held the evidence insufficient, it has pointed to an absolute lack of evidence on a material issue. Nowhere in the majority opinion have we found a statement that a witness was not credible, or that the evidence was not of sufficient weight.

Needless to say, courts of review will examine into the question of the presence or absence of material evidence in the record, and give judgment accordingly. *U. S. v. Falcone*, 311 U. S. 205, 85 L. Ed. 128.

2. Insufficiency of Evidence of Ownership of Gambling Houses.

On the question of ownership of gambling houses, referred to in the footnote mentioned, (petition, pp. 11-12) the lower court held that the evidence (given the view most favorable to the government) indicated an interest of Johnson in the gambling houses, but that there was no evidence to indicate the extent or amount of such interest, and therefore nothing to indicate that the income (presumably) received by Johnson from the gambling houses exceeded the large amounts reported in his tax returns (Tr. 195). The prosecution measured its evidence by the same gauge as if Johnson and these respondents had never filed *any* income tax returns nor paid *any* taxes, in which case proof of any interest of Johnson in the gambling houses might well be said to raise a presumption of participation in income not reported and not tax paid. The lower court merely pointed out that the theory of the prosecution had no application to the case at bar. The petition for certiorari does not meet this issue, but seems to evade it.

3. Insufficiency of Evidence of Connection of Respondents With Johnson's Tax Returns.

As to these respondents the lower court pointed out a fatal absence of evidence that they had any connection with the preparation of Johnson's returns or any knowledge or information as to their contents. Inasmuch as the gist of the wilful attempts charged against Johnson, which these respondents are alleged to have aided, was the filing of false returns which were definitely and specifically described in the indictment, it is manifest that the ruling of the lower court on this point was correct. It is also in accordance with the authorities. *Yenkitchi Ito* v. *U. S.*, 64 F. 2d 73; *Pontiff* v. *U. S.*, 9 F. 2d 29; *Hills* v. *U. S.*, 97 F. 2d 710; *Firpo* v. *U. S.*, 261 Fed. 851; *Hicks* v. *U. S.*, 150 U. S. 442. See also *People* v. *Werblow*, 241 N. Y. 55, 148 N. E. 786 (opinion by Justice Cardozo). The case of *Jin Fuey Moy* v. *U. S.*, 254 U. S. 189, cited by petitioner is not opposed to the ruling here. There, the only purpose of the wrongful issue of the prescription by the physician-defendant, was to allow the drug addict to obtain the drug illegally. Indeed, on several occasions the physician telephoned the druggist and urged sale of drugs to the addict. Plainly he was accessory to the sales.

In the case at bar however, these respondents had no connection whatever, under the evidence, with Johnson's tax returns, and no knowledge of their contents, must less whether they were accurate or false.

> "Those having no knowledge of the conspiracy are not conspirators. *U. S.* v. *Hirsch*, 100 U. S. 33, 34, 25 L. Ed. 539, 540; *Weniger* v. *U. S.*, 47 F. (2d) 692, 693; and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of the conspiracy to which the distiller was a party but of which the supplier had no knowledge."
>
> *U. S.* v. *Falcone*, 311 U. S. 205, 85 L. Ed. 128.

Under the evidence, also, these respondents received no profit if Johnson failed to pay his full income tax, and they suffered no loss if Johnson did pay his full income tax. They had no "stake in the outcome" of Johnson's alleged attempts to evade income taxes.

In *U. S.* v. *Peoni*, 100 F. (2d) 401, (C. C. A., 2d Cir.) involving sale of counterfeit money by Peoni to A who sold to B who endeavored to pass it, the court after tracing the history of the Federal statute regarding accessories and giving various definitions formulated by the early writers, said at page 402:

> "It will be observed that all these definitions have nothing whatever to do with the *probability* that the forbidden result would follow upon the accessory's conduct: and that they all demand that he in some sort associate himself with the venture, that he *participate* in it as something that he wishes to bring about, that he seek by his action to make it a success."
>
> "At times it seems to be supposed that, once some kind of criminal concert is established, all parties are liable for everything that any one of the original participants does, or even for what those do who join later. Nothing could be more untrue." (Italics supplied.)

Similar in principle are *Hicks* v. *U. S.*, 150 U. S. 442; *Firpo* v. *U. S.*, 261 Fed. 851; *Hill* v. *U. S.*, 97 F. (2) 710; *P.* v. *Barnes*, 311 Ill. 559.

The evidence in all the cases cited went much further toward establishing a connection between the unlawful act of the principal and the so-called accessory than in the case at bar, nevertheless it was held materially insufficient. Clearly, therefore the decision of the Circuit Court of Appeals on this point was correct and in accordance with previous decisions of this court and other courts of review.

The claim that the lower courts' decision here "leaves available for enforcement of the revenue acts in the field

of criminal activity only the crime of aiding and assisting in the filing of a false return," under Section 3793 of the Internal Revenue Code, is without basis. This is a substantial part of the very charge in the present indictment which could more properly have been laid under Section 3793 rather than that endorsed on the indictment. Failure of proof of the charge chosen by the prosecutor in the present case, does not prevent future prosecutions under this or whatever charge may be proper, either under Section 3793 or under Section 145 (b) of the Revenue Act of 1938. The lower court's decision here did not limit the scope of the statute but merely held that evidence on a vital issue was lacking.

4. Insufficiency of Petition and Order Continuing Jury From February Term to March Term Was Not Cured by the Allegations of the Indictment; the Latter Were Disproved by the Evidence.

As heretofore noted, the petition for certiorari in effect admits defectiveness of the order of February 28, 1940, purporting to authorize continuing existence of the grand jury into the March term. The contention of the petition for certiorari that the order was cured "by the solemn statement of the grand jury in the indictment" that it continued to sit into March to finish investigations begun in the December term, is unsound for several reasons. First, the so-called solemn statement of the grand jury in the indictment is contradicted by an equally solemn and more weighty statement of the Forewoman of the grand jury, in the petition of February 28, 1940, that the grand jury's life should be continued to enable it to finish investigations begun in the February (as well as the December) term (Tr. 33).

In addition, there was error on the part of the prosecution in causing the motion to quash (Tr. 28) and plea in

abatement (Tr. 32) of defendants to be stricken, Cf. *Edwards* v. *U. S.*, 312 U. S. 473, 480, 61 S. C. 669, 674; thereby the government prevented the forming of issues under the motion and plea and the introduction of evidence as to such issues.

An additional reason has come to light because of the tardy contentions of the government in the petitions for rehearing in the lower court, and for certiorari here, to the effect that evidence at the trial of Brown's examination before the grand jury furnished proof that the grand jury investigation in the December term was of indictment matters. As heretofore shown, the proof is affirmatively opposed to this contention. The title on Government Exhibit O-211 (transcript of Brown's grand jury examination) and the testimony of government witness Ryan, (R. 528) the court reporter, establish clearly that the affairs of one Skidmore[1] a nominal defendant were under investigation in the December term by the grand jury. From every viewpoint, therefore, the decision of the lower court was correct on the questions involved in the motion to quash and the plea in abatement.

The reference to the evidence in the Brown contempt case 116 Fed. (2d) 455 (Petition, p. 8) cannot avail petitioner. There was no opportunity for cross-examination, no witness produced the evidence and it was not certified in this case. *Edwards* v. *U. S.*, 312 U. S. 473, 482, 61 S. C. 669, 674.

The suggestion in the petition for certiorari that these grave errors are not shown to have been prejudicial, hardly needs answer. Cf. *Edwards* v. *U. S.*, 312 U. S. 473, 61 S. C. 669. The law is well established that except where the continuance of the grand jury is in strict compliance with law, that body has no legal existence beyond the original term. *In re Mills*, 135 U. S. 263, 267; *U. S.* v. *Rockefeller*,

[1] Skidmore was dismissed from the indictment herein before trial, on motion of the government, without explanation (Tr. 143).

221 Fed. 462, 466; *Ex p. Farley*, 40 Fed. 66, 69; *Nealon* v. *People*, 39 Ill. App. 481.

Where a statute extends the power of the grand jury to return indictments beyond usual limits (after running of statute of limitations) the statute should be carefully followed. *U. S.* v. *Durkee Famous Foods*, 306 U. S. 68, 83 L. Ed. 492.

The effort of the petition for certiorari to read into the lower court's decision as to the fourth count, a meaning not properly inherent therein, cannot lend importance to that decision as affecting future cases. The court's decision merely was that in the December term of 1939 an investigation by the grand jury cannot (either legally or actually) be made of an offense not committed until March 15, 1940. The decision cannot, as broadly contended by the petition, impede the thorough investigation of complex cases, by requiring that the "precise issues and particular defendants" involved in the investigation, must be anticipated during the original term of the grand jury. No such contention was made by any of respondents in the lower court, nor did that court so decide. Had it done so, the lower court would have had to hold the indictment invalid as against these respondents, because *there never has been any contention by the government that either "the precise issues" now urged against these respondents, or the identity of these respondents, as future defendants, was anticipated or under investigation by the grand jury in its original term.* To contend that the decision has such effect, attributed to it by the petition, is, we submit, entirely fanciful.

The contentions in the footnote (pages 16-17 of the petition) are likewise without basis. The decision on this point does not limit the time existence of the grand jury. The amendments to the law cited in the footnote all were for the purpose of extending the time of existence of the

grand jury for a specific purpose only, viz, to finish investigations begun in the original term. A permanent or standing grand jury with jurisdiction to investigate generally throughout its existence was not favored by the common law.

The statute itself limits the jurisdiction of the grand jury after the original term; emphasis is given to the limitation by the use of the word "solely" in the law. It is clear that the decision of the lower court on this point carries out the clearly expressed intention of the legislature.

5. Invalidity of Charges of Aiding as a Continuing Crime Of an Attempt Charged as a Non-Continuing Crime.

Under this point the petition seeks to ignore the allegations of the indictment which charges in each of the first four counts, an attempt to evade taxes committed on a specific date by a specific act, viz., filing a false income tax return. The indictment then charges that the accessories aided and abetted Johnson's alleged attempt during each calendar year in which the tax was incurred and up to March 15th of the following year and continuously thereafter up to the date of the filing of the indictment. In short, the charge in the indictment is clearly invalid in charging as a continuing crime one which is not such (*Boules* v. *U. S.*, 73 F. 2d 772, 774; *Guzik* v. *U. S.*, 54 F. 2d 618; *U. S.* v. *Mathis*, 28 Fed. Supp. 582, 584.)

The petition for certiorari endeavors to ignore the allegations of the indictment by stating that there are other means of attempting to evade taxes than the filing of a false return. However, in this case, such is the charge which the prosecution chose to bring against the respondents. It is therefore entirely immaterial that other indictments in other cases against other defendants, might charge different offenses than this.

The footnote (petition p. 22) contains two further attempts to shift ground and in effect abandon the allegations of the indictment. The first contention is that as it is permissible to charge accessories before the fact as principals, the allegations of time as to the accessories here should be considered as surplusage and without meaning. The contention seems to involve a *non sequitur*. Even if the accessories had been charged as principals, the real principal would be charged with a non-continuing crime and the others (as nominal principals), assuming the same time periods charged as here, would be charged with a continuing crime—a repugnancy almost as great as that exhibited by the present indictment.

In addition the allegations of time evidently are here made deliberately and with considerable care, and neither under the principles of law nor those of fairness to the defendants, should they be considered as surplusage.

6. Fatal Duplicity of Four Counts in Charging in Each That Respondents Were Accessories Both Before and After the Fact.

There is a fundamental difference between the offenses of accessory before and accessory after the fact.

An accessory before the fact is one who aids, abets, counsels, commands, induces, or procures the commission of a crime. By the Federal statute, such an accessory is made a principal. (U. S. C. Title 18, sec. 550.)

An accessory after the fact is one who knowingly conceals the crime or the criminal after the commission of the crime. Wharton Criminal Law (12th Ed.) sec. 281. Brill Cyc of Criminal Law, secs. 243-244.

The principle of law is well established that the joinder in one count of charges requiring different evidence and punishable by different punishments, is fatal duplicity. *Creel* v. *U. S.*, 21 F. 2d 690; *Ammerman* v. *U. S.*, 216 Fed.

326; *Allison* v. *U. S.*, 216 Fed. 329; *Lehman* v. *U. S.*, 127 Fed. 41. Under the Federal statutes an accessory after the fact is punishable by not exceeding one-half the maximum punishment prescribed for principals or accessories before the fact. The careful distinction in the statute between the two classes of accessories and the punishment to be inflicted, is a strong reason for holding that the joinder of the two charges in one count is fatally erroneous.

The claim of the government that these counts charge only the crime of accessory before the fact, cannot be maintained. It is clear that the assistance charged up to and on March 15th, viz., aiding and abetting in the commission of the illegal attempt, was a charge of being accessory before the fact. It is equally clear that the only assistance possible *after* the crime would be (not to assist in the commission of the crime already committed, but) to conceal the crime or the criminal, or to assist the criminal to evade the consequences of his crime. These two fundamentally different charges are contained in the indictment here in the first four counts. Indeed, the pleader expressly indicates an intention to charge the offense of accessory after the fact by the use of the word "conceal" which is one of the forms of that offense, and is not mentioned in the Federal statute defining the offense of accessory before the fact.

The further contention that the allegation of time of the accessories offense should be regarded as surplusage and in effect considered as stricken from the indictment, is invalid. The petition urges that accessories are never entitled to allegation of time of their alleged offenses. The cases cited do not support this statement. They hold that when charges are made of aiding and abetting without allegation of time, it will be assumed that the time of aiding was the time alleged for the principal offense.

Clearly the decision of the lower court was correct.

7. The Error in the Introduction of Witness Clifford's Testimony Was Fatal.

The introduction of the erroneous and prejudicial testimony of witness Clifford, presents no question meriting the consideration of this court. The situation here was the not uncommon one of failure of the prosecution to prepare its important hypothetical questions properly in order that the answers should not invade the province of the jury. As observed by the Court of Appeals, Clifford "necessarily was required to weigh the testimony on many conflicting points and to decide all controversies in favor of the government." Also "Not a single question by which the objectionable answers were elicited contains any assumption or hypothesis. * * * It follows that the jury were not permitted to pass upon the validity or soundness of the premises upon which the answers were based." (Tr. 200.)

It is clear therefore that the jury had little to do after hearing the testimony of this witness. The lower court said:

> "In oral argument before this court counsel for the government in effect conceded that after the testimony of this witness there was nothing left for the jury to decide except the truthfulness of his testimony." (Tr. 200.)

The witness expressed his opinion, based on assumptions not made known to the jury, and involving weighing the evidence and the credibility of witnesses, on the ultimate issues before the jury. Clearly this was error. *U. S.* v. *Spaulding*, 293 U. S. 498, 506; *Dexter* v. *Hall*, 82 U. S. 9, 26; *Wilkes* v. *U. S.*, 80 F. (2d) 285; *U. S.* v. *Stephens*, 73 F. (2d) 695, 704; *Patrick* v. *Rice*, 98 F. (2d) 550; *Prentiss* v. *Chandler*, 85 F. (2d) 733; *Hatch* v. *U. S.*, 34 F. (2d) 436; *Germantown* v. *Lederer*, 263 Fed. 672.

Conclusion.

We respectfully submit that there are no questions in this case of such character or importance as to appeal to the discretion of this court to grant certiorari.

Respectfully submitted,

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EDWARD J. HESS,
Attorneys for Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, respondents.

January, 1942.

APPENDIX.

Criminal Code:

SEC. 332. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal. (U. S. C., Title 18, Sec. 550.)

SEC. 333. Whoever, except as otherwise expressly provided by law, being an accessory after the fact to the commission of any offense defined in any law of the United States, shall be imprisoned not exceeding one-half the longest term of imprisonment, or fined not exceeding one-half the largest fine prescribed for the punishment of the principal, or both, if the principal is punishable by both fine and imprisonment; or if the principal is punishable by death, then an accessory shall be imprisoned not more than ten years (U. S. C., Title 18, Sec. 551).

Internal Revenue Code:

SEC. 3793. • • •

• • • • •

(b) *Fraudulent Returns, Affidavits, and Claims.*—

(1) *Assistance in Preparation or Presentation.*—Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (U. S. C. Supp. V, Title 26, Sec. 3793.)

Judicial Code:

> SEC. 284. * * * A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than three terms. * * * (U. S. C. Supp. V, Title 28, Sec. 421).

Revenue Act of 1936, c. 690, 49 Stat. 1648, 1703:

> SEC. 145. PENALTIES.
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> * * * * * *
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> (b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Revenue Act of 1938, c. 289, 52 Stat. 447, 513:

Section 145 (b) is identical with Section 145 (b) of the Revenue Act of 1936, *supra*.